

HONORABLE JAMES L. ROBERT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION,

Plaintiff,

vs.

MOTOROLA, INC., et al.,

Defendants.

Case No. C10-1823-JLR

MICROSOFT'S MOTION TO SEAL RE
ITS MOTION FOR PARTIAL
SUMMARY JUDGMENT

MOTOROLA MOBILITY LLC, et al.,

Plaintiffs,

vs.

MICROSOFT CORPORATION,

Defendants.

**NOTED FOR:
Friday, July 19, 2013**

I. RELIEF REQUESTED

Pursuant to Local Civil Rule 5(g) and paragraphs 2(a) and 8 of the protective order entered in this case, Microsoft respectfully seeks leave to file under seal the following documents:

- (1) Exhibits 1-3, 5-7, 9-12 to the Declaration of Christopher Wion in Support of Microsoft's Motion for Partial Summary Judgment of Breach of Contract and Summary Judgment on Motorola's Third, Fourth, Fifth, Seventh, Eighth, and

MICROSOFT'S MOTION TO SEAL RE ITS
MOTION FOR SUMMARY JUDGMENT - 1

No. C10-1823

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1 Ninth Affirmative Defenses and Second Counterclaim (“Wion Summary
Judgment Declaration”); and

- 2 (2) Microsoft’s Motion for Partial Summary Judgment of Breach of Contract and
3 Summary Judgment on Motorola’s Third, Fourth, Fifth, Seventh, Eighth, and
4 Ninth Affirmative Defenses and Second Counterclaim (“Microsoft’s Summary
Judgment Motion”), to the extent it refers to or describes the sealed exhibits to
5 the Wion Summary Judgment Declaration listed above.

6 Microsoft seeks to file the foregoing materials under seal because they contain
7 information that has been identified by Microsoft, Motorola, and/or third parties as confidential
8 business information under the terms of the protective order issued in this case.

9 Specifically, Microsoft is filing a public version of Exhibit 6 to the Wion Summary
10 Judgment Declaration (the Opening Report of Motorola’s expert, Gregory Leonard) that
11 redacts three paragraphs disclosing Microsoft’s confidential licensing practices. Microsoft’s
12 interest in maintaining the confidentiality of these practices sharply outweighs any public
13 interest in their discovery. Microsoft would be exposed to a significant risk of competitive
14 harm if they were disclosed to third parties.

15 With the exception of the limited redactions to Exhibit 6 referenced above (and further
16 described below), limited additional redactions to Exhibit 6 requested by Motorola, and
17 redactions to Exhibit 5 requested by Motorola, all other exhibits at issue on this motion are
18 being filed under seal in their entirety, at Motorola’s request.

19 Microsoft is publicly filing a version of its Motion for Summary Judgment that redacts
20 references to, and descriptions of, confidential portions of the referenced exhibits identified by
21 the parties.

22 For these reasons, Microsoft respectfully requests permission to file the above-
23 referenced documents under seal and that the Court direct such documents to remain under
24 seal.
25

II. LCR 5(g)(3)(A) CERTIFICATION

The parties met and conferred on July 3, 2013 in an effort to minimize the amount of material to be filed under seal in connection with this motion. As a result, the parties were able to reduce both the number of documents to be redacted (or sealed in their entirety) as well as the scope of the proposed redactions.

III. FACTS & AUTHORITY

A. The Operative Protective Order and Applicable Court Rules Permit Microsoft to File Confidential Information under Seal.

Pursuant to the Protective Order issued by the Court on July 21, 2011, as amended by Order dated October 3, 2012, Microsoft is permitted to file materials designated by either party as Confidential Business Information¹ under seal, with such documents to remain under seal upon Court approval. Paragraphs 2(a) and 8 of the Protective Order govern the filing of documents under seal. Paragraph 2(a) provides:

Any information submitted in pre-trial discovery or in a pleading, motion, or response to a motion in this action, either voluntarily or pursuant to order, and which is asserted by a supplier to contain or constitute Confidential Business Information shall be so designated by such supplier in writing...and shall be segregated from other information being submitted. Documents shall be clearly and prominently marked on their face with the legend: “[SUPPLIER’S NAME] CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO PROTECTIVE ORDER” or a comparable notice. During the pre-trial phase of this action, such information, whether submitted in writing or in oral testimony, shall be disclosed only *in camera* before the Court and shall be filed only under seal, pursuant to Rule 5(g) of the Local Civil Rules of the United States District Court for the Western District of Washington.

Paragraph 8 likewise provides that:

¹ “Confidential Business Information” is defined in the parties’ Protective Order as “information which has not been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, amounts or source of any income, profits, losses, or expenditures.” Protective Order Regarding the Disclosure and Use of Discovery Materials (ECF No. 72), ¶1 (amended by Order dated October 3, 2012 (ECF No. 447)).

Any Confidential Business Information submitted to the Court in connection with a motion or other proceeding within the purview of this action shall be submitted under seal pursuant to paragraph 2 above.

Id., at ¶ 8.

The Federal Rules of Civil Procedure recognize that courts may permit parties to file “trade secrets or other confidential research, development, or commercial information” under seal. Rule 26(c)(1)(G) and (H). District courts “are in the best position to weigh the fairly competing needs and interests of the parties affected by discovery,” in crafting the appropriate treatment of documents for which protected treatment is requested. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199 (1984); *see also Phillips v. General Motors Corp.*, 307 F.3d 1206, 1211-1212 (9th Cir. 2002).

A party seeking to seal a judicial record attached to a dispositive motion must articulate “compelling reasons” that outweigh the public policies favoring disclosure. *Kamakana v. City and Cnty. Of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). This presumption may be overcome only on a compelling showing that the public’s right of access is outweighed by the interests of the public and the parties in protecting the court’s files from public review. However, “the public interest in understanding the judicial system would appear to be less where ... the documents in question are irrelevant to the Court’s decision.” *Network Appliance, Inc. v. Sun Microsystems Inc.*, 2010 WL 841274, at *2 (N.D. Cal. Mar. 10, 2010) (citing *Kamakana*, 447 F.3d at 1179) (documents supporting dispositive motion “[not] bearing on the resolution of the dispute on the merits ... are therefore more akin to the ‘unrelated,’ non-dispositive motion documents the Ninth Circuit contemplated in *Kamakana*”).

“In general, ‘compelling reasons’ ... exist when such ‘court files might have become a vehicle for improper purposes,’ such as the use of records to ... release trade secrets.” *Kamakana*, 447 F.3d at 1179 (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978)). The Ninth Circuit has adopted the Restatement’s definition of “trade secret.” *See*

1 *Ultimate Timing, L.L.C. v. Simms*, 2010 WL 786021, at *1-2 (W.D. Wash. Mar. 4, 2010)
 2 (citing *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972)). Under that standard, a “trade
 3 secret may consist of any formula, pattern, device or compilation of information which is used
 4 in one’s business, and which gives him an opportunity to obtain an advantage over competitors
 5 who do not know or use it.” *Id.*, 2010 WL 786021, at *2 (quotations omitted).

6 **B. Compelling Reasons Exist to Grant Microsoft’s Motion.**

7 1. Paragraphs 67, 74, and 77 of Exhibit 6 to the Wion Summary Judgment Declaration
 8 (Mr. Leonard’s Opening Report) Should Remain Redacted.

9 Microsoft requests that the Court maintain under seal the redactions to paragraphs 67,
 10 74, and 77 of the Leonard Opening Report, attached to the Wion Summary Judgment
 11 Declaration as Exhibit 6. These paragraphs discuss Microsoft’s confidential licensing
 12 practices. Microsoft has a significant interest in maintaining the confidential nature of its
 13 licensing strategies and practices that outweighs any potential interest the public may have in
 14 accessing this information. Microsoft could suffer significant harm in its future licensing
 15 negotiations and in managing its licensing business if this information were publicly disclosed.

16 Further, the redacted paragraphs are unrelated to the portions of Exhibit 6 on which
 17 Microsoft relies in support of Motion for Summary Judgment, and are unlikely to play any role
 18 in the Court’s consideration of the merits of Microsoft’s motion. The public’s interest in
 19 understanding the judicial system will not be significantly furthered by providing access to
 20 these paragraphs. For these reasons, paragraphs 67, 74, and 77 of the Leonard Report should
 21 remain under seal.
 22

23 2. Exhibits 1-3, 5-7, and 9-11 to the Wion Summary Judgment Declaration.

24 Motorola has requested that Microsoft file Exhibits 1-3, 7, and 9-11 to the Wion
 25 Summary Judgment Declaration under seal.

Motorola also has requested that Microsoft redact material appearing on pages 70-72, 155, 191-92 of Mr. Leonard's deposition transcript (Exhibit 5), along with paragraphs 17, 66, and 70-71 of Mr. Leonard's opening expert report (Exhibit 6). Pursuant to the Parties' Stipulated Protective Order and this Court's local rules, Microsoft is filing unredacted versions of these documents under seal. Accordingly, while only Motorola confidential information is being redacted from the public version of Exhibit 5, confidential information of *both* parties is being redacted from the public version of Exhibit 6.

Microsoft takes no position at this time with respect to the propriety of Motorola's requests as to these documents.

IV. CONCLUSION

For the reasons set forth herein, Microsoft respectfully requests that the Court grant its motion. A [Proposed] Order Granting Microsoft's Motion to Seal re its Motion for Partial Summary Judgment has been submitted herewith.²

DATED this 3rd day of July, 2013.

RESPECTFULLY SUBMITTED,
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² Nothing herein is intended as a waiver of Microsoft's right to contest Motorola's designation of material as Confidential Business Information in accordance with the terms of the Protective Order. Microsoft expressly reserves the right to do so as the circumstances warrant.

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CERTIFICATE OF SERVICE

I, Tim Murphy, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On the 3rd day of July, 2013, I caused the preceding document to be served on counsel of record in the following manner:

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DATED this 3rd day of July, 2013.

s/ Tim Murphy

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